

ALLAHABAD HIGH COURT

Azizun Nisa

Vs.

Asst. Custodian

Civil Misc. Writ No. 2872 of 1956

(Desai and Beg, JJ.)

11.04.1957

JUDGMENT

Desai, J.

1. This is an application for a writ of certiorari, order or direction to quash the declaration dated 7-3-1953 (wrongly mentioned as 17-3-1953 in the application) under section 7 of the Administration of Evacuee Property Act (No. XXXI of 1950) (to be referred to as Act No. XXXI) the order of the Competent Officer, Faizabad (opposite party No. 2) for sale of the property in dispute dated 20-3-1956 and the sale held by the Competent Officer on 13-8-1956 of the property in dispute in favour of Sri Mahabir Prasad Jhunjhunwala (opposite party No. 3). There is the ubiquitous prayer for any other and further relief as the Court may deem fit. The applicants are related to one another as would appear from the following pedigree : The property in dispute is the Noori Sugar Mills together with the appurtenant buildings and land situated in village Bhatni; it belonged to the family of Moharram Mian and Shukrulla. According to a compromise arrived at between the parties in 1922 Shukrulla got five annas and four pies share and Rahmat Bibi, Khatoon Bibi, Azizun Nisa and Taghma Bibi, about one anna and seven pies share each. Shukrulla made a waqf alal-aulad in respect of his five annas and four pies share in 1941 and named Abdul Razzaq as the first mutwalli and his four sons as the beneficiaries. Khatoon Bibi's father and forefathers were born in India and she also was born in India. In December, 1947, she went to Karachi to see her husband's sister Sayeeda Bibi who was said to be seriously ill, leaving her husband Abdul Barkat in India. Before she could return to India restrictions were imposed upon entry into India and a permit system was introduced. On 22-11-1949 the Assistant Custodian, Evacuee Properties, opposite party No. 1, published a declaration that all the property of Khatoon Bibi was evacuee property and called upon the persons in possession to hand it over to the Custodian and Abdul Barkat filed an objection against it. On 5-7-1950 the Assistant Custodian issued a notice to Khatoon Bibi asking her to show cause why she be not declared an evacuee and her property be not declared as evacuee property under the

Ordinance. Abdul Barkat filed an objection as his wife was still in Pakistan; on 7-3-1951 the Assistant Custodian dismissed it and declared the property as evacuee property. Khatoon Bibi then came to India on a temporary passport issued by the Pakistan Government. On 20-3-1956 the Competent Officer held that the share of six pies in the property in dispute claimed by Azizun Nisa as an heir of Rahmat Bibi was evacuee property. Nazir Ahmad and Bashir Ahmed and their father Shukrulla and forefathers also were born in India; they were also declared to be evacuees and their shares in the property in dispute as evacuee property on 14-12-1955. On 15-2-1954 a notice under Section 6 of the Evacuee Interest (Separation) Act (No. LXIV of 1951) (to be referred to as Act No. LXIV) was issued by the Competent Officer to Azizun Nisa inviting her claim to an interest in the Noori Sugar Works, Bhatni, the land on which it stands and a grove standing on certain plots. Similar notices were issued to other co-sharers in the Noori Sugar Works. Several claims were filed and the Competent Officer decided them on 20-3-1956. He held that Azizun Nisa had two annas and nine pies share, Khudaija and Shamshun Nisa eight and a half pies share each. Abdul Majeed two annas and five pies share, Abdul Wahid three annas and five pies share, Khatoon Bibi, two annas and three pies share and Bashir Ahmad and Naisir Ahmad, one anna and four pies share each as beneficiaries. Since Bashir Ahmad and Nasir Ahmad had preferred appeals against their being declared evacuees and the appeal was pending, the Competent Officer ordered that their two annas and eight pies share in the income would vest in the Custodian as evacuee property so long as their appeal was not allowed. Coming to the mode of separation of the interest of the evacuees from that of the non-evacuees in the property in dispute he observed that partition of the Sugar Works was out of question, that the non-evacuees were not prepared to purchase the shares of the evacuees and that sale of the Sugar Works by public auction was the only course left open. He, therefore, ordered sale of the property in dispute by public auction. The auction took place on 13-8-1956 and opposite party No. 3 purchased the property in dispute. An objection against the auction was dismissed on 1-10-1956 and an appeal is pending before the Appellate Officer, New Delhi.

2. The applicants to this petition are Khatoon Bibi, who has been declared to be an evacuee, and five other co-sharers in the property in dispute. Bashir Ahmad and Nasir Ahmad evacuees have not joined in the application. The applicants contend that the orders declaring Khatoon Bibi, Bashir Ahmad and Nasir Ahmad as evacuees are invalid and of no effect, that they are not evacuees at all, that the Act No. LXIV is unconstitutional, that the property in dispute includes a mosque and grave-yards, which being waqf property cannot be sold, and that the entire property in dispute should not have been put to auction by the Competent Officer.

3. The application is opposed by the opposite parties. The Assistant Custodian in his affidavit admits that the property in dispute is owned by various persons in accordance with the compromise of 1922, and that Shukrullah made a waqf of his share naming his four sons as the beneficiaries. He asserted that Khatoon Bibi, Bashir Ahmad and Nasir Ahmad are evacuees; he admitted that Khatoon Bibi once came to India on a passport issued by the Pakistan Government but asserted that she returned to Pakistan and is now there. He claimed that her property vested in

the Custodian under the U.P. Administration of Evacuee Property Ordinance (No. 1 of 1949) (to be referred to as Ordinance No. I) automatically, that the so-called notice of 22-11-1949 was only a demand to the persons in possession of her property to surrender possession to the Deputy Custodian, that the notice issued by him on 5-7-1950 was only by way of abundantia cautela and did not affect the vesting that had already taken place under the Ordinance No. I, that Khatoon Bibi never filed any objection that her property was not evacuee property and Abdul Barkat could not file an objection on her behalf, and that the entire Sugar Works formed one composite property within the meaning of the Act No. LXIV. As regards the proceedings before the Competent Officer, it was affirmed in the counter affidavit that there was no irregularity attending the sale of the property in dispute, that the bid of the opposite party, No. 3, of Rs 16,05,000/- was quite reasonable, that the Competent Officer had offered to sell the shares of the evacuees to the claimants on the basis of their own valuation of rupees twenty lakhs but they had refused to buy them, that the property in dispute could not be partitioned conveniently, that partition between the evacuees and the claimants was not claimed by any of the claimants, that the mosque and the graveyards are not affected by the auction sale, that it was not pointed out before the Competent Officer that the property in dispute included a mosque and graveyards, that the Act. No. LXIV does not infringe any of the fundamental rights, that the applicants had an alternative remedy by way of an appeal, that they all except Azizun Nisa failed to avail themselves of it, that Azizun Nisa's appeal was pending, that it was conceded by the claimants that Khatoon Bibi was an evacuee, that the application was filed after inordinate delay and that they had lost their remedy, if any, on account of estoppel and acquiescence. Opposite Party No. 3 also filed a counter-affidavit; it is more or less on the same lines as that of the Assistant Custodian. He referred to an affidavit filed by Abdul Wahid on 2-3-1956 in the court of the Competent Officer to the effect that Rahmat Bibi just before her death in 1953 had said that she was bequeathing to Azizun Nisa her property and also the share of Khatoon Bibi because she had migrated to Pakistan, and asserted that she went away to Pakistan in December, 1947, permanently leaving her husband behind in India and giving up her Indian nationality.

4. The first law applicable to evacuees was the U.P. Ordinance, No. I, which came into force on 24-6-1949 and was repealed impliedly on 23-8-1949, on which date the Administration of Evacuee Property (Chief Commissioners Provinces) Ordinance No. XII of 1949 (to be referred to as Ordinance No. XII) was extended to this State by the Central Administration of Evacuee Property (Chief Commissioners Provinces) Amendment Ordinance No. XX of 1949 (to be referred to as Ordinance No XX). The Ordinance, No. I, defined "evacuee" as a person

"who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has on or after the first day of March, 1947, left any place in the United Provinces for any place outside India", "evacuee property" as "any property in which an evacuee has any right or interest" excluding movables and any property belonging to a joint stock company, having its registered office in Pakistan, and "property" as "any property, right or interest". Section 5

laid down that "all evacuee property situated in the United Provinces shall vest in the Custodian" and Section 6 provided that "the Custodian may, from time to time, notify by publication in the official gazette evacuee properties which have vested in him" and required any person in possession of any evacuee property after the vesting of it in the Custodian to surrender possession of it to him on receipt of a notice from him. Any person who claimed any right to, or interest in, the property notified as evacuee property or required to be handed over to the Custodian, was allowed by Section 8 to prefer a written claim to the Custodian on the ground that the property was not evacuee property or that the Ordinance did not affect his interest in it. The Custodian was authorized to hold a summary inquiry and dispose of the claim. A remarkable feature of the Ordinance was that the property of an evacuee vested automatically in the Custodian, that no declaration that the owner had become an evacuee was required at all and that even a notification that the property had vested in the Custodian was not mandatory; a notice was mandatory only if the Custodian required possession to be surrendered to him by the person in actual occupation. No action was taken by the Custodian under the Ordinance; no notice was published regarding any property of the alleged evacuees (Khatoon Bibi, Abdul Wahid and Abdul Majid) having vested in the Custodian nor did he issue any notice to the persons in possession to surrender possession to him. In reply to the contention of the opposite parties that the property of the evacuees vested automatically in the Custodian it was contended on behalf of the applicants that the Ordinance was unconstitutional. They took the plea through a supplementary petition. The Ordinance was made by the Governor of the United Provinces in exercise of the powers conferred by Section 88 of the Government of India Act, 1935, which was then in force and in pursuance of the instructions received from the Governor-General. Under Section 88 (3) the Governor could not provide in an ordinance for a matter in respect of which the Provincial Legislature could not make a law. The Provincial Legislature could make laws in respect of the matters enumerated in Lists II and III of Schedule VII of the Government of India Act. Evacuees as defined in the Ordinance, No. I, and evacuee property were not included among the matters in the two Lists. Therefore, Section 88 of the Government of India Act did not authorize the Governor to make an ordinance like the Ordinance, No. I. The Constituent Assembly passed the Government of India (IIIrd Amendment) Act No. IV of 1949 adding in List III the matter "custody, management and disposal of property declared by law to be evacuee property". The Act came into force on 25-8-1949; with effect from that date the Provincial Legislature became empowered to make laws in respect of custody, management and disposal of evacuee property. It was not given retrospective effect and it did not validate the Ordinance, No. I, that was ultra vires the Governor before it came into force.

" A statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objections but must be re-enacted,";

See Cooley's Constitutional Limitations, Volume I, page 384, and *Saghir Ahmad v. State of U.P.*¹. The Ordinance, No. I, therefore, remained void even after 25-8-49 and there did not come into existence any vesting of any property in the Custodian.

5. The Ordinance, No. XII, was made by the Governor-General in exercise of the powers conferred upon him by Section 42 of the Government of India Act on 13-6-1949. Under Section 42 the Governor-General could make an ordinance only in regard to a matter in respect of which the Central Legislature could make a law. The

¹1955 S.C.R.. 707 at P.728 : (AIR 1954 SC 728 at p. 739)

Ordinance, No. XII, dealt with evacuees and evacuee property and was practically in the same terms as the Ordinance, No. 1. It was laid down in Section 99 of the Government of India Act that subject to the provisions of it, the Central Legislature could make laws "for the whole or any part of the British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof". The Central Legislature had power to make laws with respect to any of the matters enumerated in Lists I and III, vide Section 100. "Evacuees" and "evacuee property" were not matters enumerated in List I or III and consequently the Central Legislature had no power on 13-6-1949 to make laws regarding them by virtue of the provisions of Section 100. The three Lists enumerated certain matters but none of them contained "a residuary matter" or "any other matter not enumerated in any other list" such as is to be found in List I - Union List, of our Constitution, with the result that the power to make a law in respect of any matter not enumerated in any of the Lists was not conferred upon either of the Legislatures. There was, however, Section 104 which authorized the Governor-General to empower, by a public notification, either Legislature to enact a law with respect to any matter not enumerated in any of the Lists. Therefore, the Central Legislature could enact a law in respect of evacuees and evacuee property only if it had been empowered by a public notification by the Governor-General, but it has not been shown to us that it had been. If it had not been, and, therefore, it could not enact a law regarding those matters, the Governor-General also could not make an Ordinance regarding them. Though the authority competent to enact an ordinance was the same as that competent to empower the General Legislature to enact a law, it could not make an ordinance without first, even if formally, empowering the Central Legislature to enact a law; it could not skip over the duty of first empowering the Central Legislature to enact a law. The Governor-General had no power to make an ordinance in respect of evacuees and evacuee property unless he first brought those matters within the legislative field of the Central Legislature. The provisions of Section 42 (3) were governed by those of Section 104 as much as by those of Section 100.

6. Sri Dhawan contended that the powers conferred by Section 99 upon the Central Legislature to make laws were full subject only to the provisions of Section 100, that the Central Legislature had no power to make laws only in respect of the matters enumerated in List II and that since "evacuees" and "evacuee property" were not enumerated in List II, the power to make laws in respect of any matter including "evacuees" and "evacuee property" conferred by Section 99 remained unimpaired by the provisions of Section 100 (3). In other words, it was contended,

Section 99 not only defined the territorial jurisdictions of the two Legislatures but also conferred power upon them to make laws in respect of any matter barring those removed from their competence by Section 100 and Section 100 did not confer legislative powers but only prohibited the legislatures from legislating in respect of certain matters. A similar contention advanced before Rajamannar C.J. and Rajagopala Ayyangar J. of the Madras High Court was rejected by them; see *Santhamma v. Neelamma*² It may be conceded that when the Parliament enacted the Government of India Act it provided for the law in respect of any conceivable matter being within the legislative competence of one Legislature or the other and that it did not reserve to itself the right to make a law in respect of any matter to be applied in India. But it does not follow

² AIR 1956 Mad 642

that all the legislative powers were conferred upon the Legislatures by Section 99 and that the three Lists did not exhaust all the matters in respect of which any law could be made by one Legislature or the other. It cannot be disputed that Section 104 conferred additional powers of legislation upon the Legislatures; they could be additional only to the powers conferred under the other provisions namely Sections 99 and 100. It follows that the powers conferred by those provisions were not exhaustive powers; had they been exhaustive powers nothing would have been left which could be added by Section 104. Section 99 must, therefore, be interpreted only to prescribe the territorial limits within which the laws enacted by the two legislatures were to operate; in respect of which matters they could make laws was left to be dealt with elsewhere. In respect of which matters laws could be made by each Legislature was exhaustively laid down in Sections 100 and 104. Section 100 dealt with certain matters enumerated in the three Lists and provided which Legislature could make a law in respect of which of them; for all other matters Section 104 made provision. The idea of a Legislature being given unlimited power of legislation even within certain territorial limits is incompatible with the existence of two different Legislatures operating in over-lapping territories. A Legislature operating in one territory can have unlimited legislative powers without affecting any law made by another Legislature having unlimited powers of legislation but operating in an entirely different territory, but a Legislature operating in one territory and another Legislature operating in a part of it cannot both be given unlimited legislative powers without there being a clash between them. Consequently whenever two Legislatures have been created with over-lapping territorial jurisdictions, each has not been given unlimited legislative powers but only one has been given such powers. Under our Constitution the Union has the residuary powers of legislation; so also in Canada and Burma. In America and Australia the residuary powers vest in the States. Sri Dhawan referred us to *Bank of Toronto v. Lambe*³, and *Attorney-General for Ontario v. Attorney-General for Canada*⁴, both being cases governed by the British North America Act, 1867. In the former case a State Act imposing certain direct taxes on commercial corporations was held to be intra vires and in the latter certain Dominion Acts authorising the Dominion Government to refer questions to the Supreme Court for answers and State Acts authorizing the State Governments to refer to the State Courts questions for answers were held to be intra vires the respective legislatures. I do not know how the first case helps the contention advanced by Sri Dhawan; if he relied upon the observation at page 588 - "And they adhere to the view which has always been taken by this

Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament" - it has no application in the case before us because the residuary power vesting in the Central Legislature was conditional upon the Governor-General's empowering it by a public notification. Moreover the residuary power vested in the Parliament of Canada not because it was created a legislative body but because the residuary power was expressly conferred upon it. In the other case the Judicial Committee overruled the contention that neither Legislature in Canada had the power to pass an Act for asking questions of the highest Court within its jurisdiction. Their Lordships observed at pages 583-584 :

³(1887) 12 A. C. 575

⁴(1912) AC 571

"In the interpretation a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids . . . if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense."

Of course power to make a law in respect of any matter was conferred upon one Legislature or the other by the Government of India Act; if it was not conferred through the Lists referred to in Section 100, it was conferred through Section 104. The residuary power vested in one Legislature or the other according to the discretion of the Governor-General is to be exercised through a public notification. It did not vest unconditionally in the central legislature; *Abdul Majid v. P. R. Nayak*⁵, The residuary power in Canada vested in the centre, but the vesting was absolute and not conditional and this fact distinguishes the present case from the Canadian case.

7. Section 104 of the Government of India Act was amended by the India (Provisional Constitution) Order, 1947, which came into effect on 15-8-1947; but the amendment did not affect the relevant provisions of Section 104. Moreover no amendment was made in Section 100.

8. We are of the opinion that the Ordinance, No. XII, was ultra vires the Governor-General. As originally made it was to be in force only in the Chief Commissioners' Provinces.

9. On 25-8-1949, as mentioned above Entry No. 31-B regarding custody, management and disposal of evacuee property was added in List III of the Government of India Act with the consequence that with effect from that date, the Central and the Provincial Legislatures both became competent to enact laws in respect of evacuee property. On 23-8-1949 the Governor-

General promulgated the Ordinance No. XX, whereby the provision of the Ordinance, No. XII relating to its extent was amended and it was extended to U.P. and Section 41 was added to save the effect of the Ordinance No. 1. The Ordinance No. XX could not be challenged on the grounds on which the Ordinances Nos. I and XII have been successfully challenged but the amendments made by it in the Ordinance No. XII could not and did not remove its constitutional defect. The defect arising out of the lack of the Governor-General's power to promulgate it could not possibly be removed by any amendment of it. Since it was unconstitutional and hence, did not exist in the eye of law, there was nothing that could be extended to U.P. Even if it was possible to enforce it in U.P. by making an Ordinance providing that the provisions of the Ordinance No. XII would extend to U.P., this was not what was exactly done. It was no use enlarging the extent of the Ordinance, which was unconstitutional wherever it applied. Therefore, the Ordinance No. XII remained null and void even after being extended to U. P.

⁵ AIR 1951 Bom 440

Section 41 added to the Ordinance, No. XII, was to the effect that notwithstanding the expiry of the Ordinance No. 1. "any thing done or any action taken in the exercise of any power conferred by the Ordinance, shall be deemed to have been done or taken in the exercise of the powers conferred by this Ordinance." We have pointed out that nothing had been done, and no action had been taken, in the exercise of any power conferred by the Ordinance, No. I. The only thing that could have happened under it, (if it were constitutional) is that the property of the three evacuees vested in the Custodian, but this vesting would have been the direct result of the enforcement of it, and could not be said to be "anything done", because a consequence arising out of a provision of law cannot be said to be something done. Nothing can be said to be done in the absence of a doer. Moreover it must have been done "in exercise of any power conferred by the Ordinance." We respectfully do not agree with the contrary view expressed by our brother M.L. Chaturvedi in *Abdul Raoof v. Asst. Custodian, Saharanpur*⁶, The questions of the constitutionality of the Ordinance Nos. I and XII, and of the effect of the amendment of the latter by the Ordinance No. XX were not raised before him and they were assumed to be constitutional. The question whether the vesting enjoined by the Ordinance No. I was something done in exercise of the powers conferred by it was also neither raised nor discussed. Section 5 (2) kept alive any vesting that had occurred under any corresponding law in force immediately before the commencement of the Ordinance; as no vesting occurred under the Ordinance No. I, this provision also cannot be availed of.

10. On 18-10-1949 the Governor-General enacted another Administration of Evacuee Property Ordinance, No. XXVII (to be referred to as Ordinance No. XXVII). It extended to U. P. and through Section 55 repealed the Ordinance, No. XII. But anything done or any action taken in exercise of any power conferred by the Ordinance, No. XII. was preserved as if it had been done or taken in exercise of the powers conferred by the Ordinance. No. XXVII. The Ordinance remained in force up to 17-4-1950, when it was repealed by Section 58 (2) of the Act, No. XXXI. The first action taken by the Custodian in respect of the property in dispute was during the enforcement of Ordinance, No. XXVII. It was the notice issued on 22-11-1949 by the Deputy

Custodian, Deoria, to Khatoon Bibi informing her and her manager that all (her) movable and immovable property in the form of the Noori Sugar Works, Zamindari, tenancy, buildings etc., was declared evacuee property and was being taken under the protection of the Custodian and requiring them to surrender possession over the entire property or file an objection within 30 days. There was no description of the property at all given in the notice. Abul Barkat in his objection dated 19-1-1950 alleged that Khatoon Bibi was not an evacuee, that she had only gone to Pakistan to visit her ailing sister-in-law and was prevented from returning to India by the restrictions imposed on entry into India, that she was trying to obtain a permit to return to India, that she owned one anna and nine pies share in the Noori Sugar Works and that it should be released from attachment. No orders were passed by the Custodian on the objection. Abul Barkat had no right to file an objection on behalf of Khatoon Bibi; only she could file an objection claiming that she was not an evacuee. Abul Barkat could file an objection only on his own behalf, i.e., if he claimed that he had a share in the property and not Khatoon Bibi. Section 7 of the Ordinance laid down that where the Custodian was of opinion that any property was

⁶ Civil Misc. Writ No. 692 of 1952, D/-26-11-1954 (All)

evacuee property, he should hold an inquiry after giving notice to the persons interested and pass an order declaring the property to be evacuee property. Any property declared to be evacuee property under Section 7 was to vest in the Custodian under Section 8 (1). Sub-section (2) of Section 8 laid down that

"where immediately before the commencement of this Ordinance any evacuee property had vested in.....a custodian under any law repealed hereby, the evacuee property shall, on the commencement of this Ordinance, be deemed to have been vested in the custodian appointed or deemed to have been appointedunder this Ordinance and shall continue to so vest"

and Sub-section (4) laid down that where after the vesting of any evacuee property in the Custodian any person was in possession of it, he should on demand surrender possession of it to the Custodian. Now no proceedings under Section 7 were taken in the present case, neither did the Custodian hold an inquiry about the property in dispute being evacuee property nor did he give notice of any such inquiry to the persons interested, nor did he pass an order declaring the property to be evacuee property. In other words he did not proceed under Section 7 at all. Neither had anything been done or any action been taken in exercise of the powers conferred by the Ordinance, No. XII, nor was that Ordinance of any validity. Therefore, the Custodian could not avail himself of the provisions of Section 55 (3) of the Ordinance, No. XXVII, and could not say that the property in dispute had become evacuee property already. He also did not declare the property to be evacuee property. Nothing; therefore, vested in him under Sub-section (1) or could be deemed to have been vested in him under Sub-section (2), and he had no jurisdiction to demand possession over the property in dispute under Sub-section (4) . It was observed in *Ebrahim Aboobaker v. Tek Chand*⁷, that the property must be declared to be evacuee property under Section 7 of the Act No. XXXI before it can vest under Section 8 (the relevant provisions

of Sections 7 and 8 of the Act, No. XXXI are similar to those of Sections 7 and 8 of the Ordinance no. XXVII). In *Allaudin v. M. B. Meher*⁸, Tendolkar J. observed that a notice under Section 7 of the Act, No. XXXI, is mandatory and that if it is not given, the custodian has no jurisdiction to declare a property as evacuee property. The same view was taken by Mehta and A. H. Khan, JJ. in *Haji Suleman v. Custodian of Evacuee Property, M.B*⁹.

11. Act No. XXXI came into force on 17-4-1950 and repealed the Ordinance, No. XXVII. Its provisions, including the saving clause, are similar to those of the repealed Ordinance. Section 7 (1) of the Act is an exact reproduction of Section 7 (1) of the Ordinance. After declaring a property to be evacuee property the Custodian is required under Sub-section (3) to notify it in the official gazette. Section 8 (1) provides that any property declared to be evacuee property under Section 7 shall be deemed to have vested in the Custodian with effect from the date on which the evacuee leaves or left for any place outside India. Evidently Sections 7 and 8 (1) deal with properties declared to be evacuee properties after the enforcement of the Act. Properties that had already vested as evacuee properties in the Custodian under the

Ordinance, No. XXVII were to be deemed to be evacuee properties declared as such

⁷1953 SCR 691 at p. 701: AIR 1953 SC 298 at P. 301 ⁹ AIR 1954 Mad Bha 173

⁸ AIR 1952 Bom 213

within the meaning of the Act and to have vested in the Custodian : vide Sub-section (2) of Section 8. It has been found that the property in dispute did not vest in the Custodian under the Ordinance, No. XXVII, and therefore Section 8 (2) did not apply to it. If it could vest in the Custodian, it could be only under Sub-section (1) on its being declared to be evacuee property under Section 7. Section 58 (3) contains a provision similar to that of Section 55 (3) of the repealed Ordinance but with the important difference that it saves not only the effect of anything done or any action taken under the repealed Ordinance but also its previous operation. Section 55 (3) of the Ordinance No. XXVII, did not save the previous operation of the Ordinance No. XII, repealed by it. The vesting of an evacuee property in a Custodian under Ordinance No. I or Ordinance No. XII amounts to operation of the Ordinance and had it been saved by Section 55 (3) the vesting would have continued in spite of the repeal, but as pointed out earlier it saved only the effect of anything done or any action taken. That lacuna does not exist in the present Act, and if any property had vested in a Custodian under the Ordinance No. XXVII, it would continue to vest in him in spite of the repeal of the Ordinance. But if the vesting was automatic under the Ordinance i.e., it was the effect of a provision of it and not of anything done or action taken in exercise of the powers conferred by it, it would continue but the property would not become evacuee property within the meaning of the Act. In order that it should become so it would have to be declared to be such and hence Section 8 (2) was enacted. Nothing was done, and no action was taken by any authority in exercise of the powers conferred by the Ordinance No. XXVII and, therefore, it is unnecessary to refer any more to Section 58 (3).

12. Sri S. S. Dhawan contended that for the purpose of giving effect to the provisions of Section

58 it is irrelevant to go into the question whether the repealed Ordinance was valid or not. Section 58 saves the effect of the previous operation of, and anything done or any action taken in exercise of any power conferred by or under, the Ordinance. No. XXVII and it may be conceded that regardless of whether the Ordinance was valid or not anything done or any action taken in exercise of any power conferred by or under it will be deemed to have been done or taken in the exercise of the powers conferred by the Act No. XXXI. A thing can be done or an action can be taken in the exercise of any power conferred by an Ordinance even though it is invalid; it does not cease to be thing done or an action taken in the exercise of any power conferred by or under it merely because it is invalid. Section 53 takes into consideration the reality and not the legality of the thing done or the action taken : The position as regards previous operation is, however, different; if an ordinance is invalid, it cannot operate at all. But neither was there any previous operation of the Ordinance, nor had anything been done or any action been taken in the exercise of the powers conferred by or under it, with regard to the property in dispute. In the case of Abdul Majid (E) (supra) the learned Chief Justice observed at page 447 :

"The validity of an order is to be judged not with reference to the Ordinance under which it was passed, but with reference to the Act subsequently passed by Parliament. Therefore if the order was a valid order judged by the Act, then its validity must be upheld although it was invalid or illegal or ultra vires if judged with reference to the Ordinance".

Of course if an order is invalid or illegal because it was not made in exercise of any power conferred by or under an ordinance, it would be invalid and its effect would not be saved under Section 58 of the Act, No. XXXI. But this is not what the learned Chief Justice meant; what he meant is that the illegality of an Ordinance would not prevent the effect of an order passed under it being saved. There is, however, no occasion for considering these observations of the learned Chief Justice in the present case; because no action was taken and nothing was done in exercise of any power conferred by or under the Ordinance, No. XXVII.

13. The notice contemplated by Section 7 is to be given in such manner as may be prescribed; the manner is prescribed in the Administration of Evacuee Property (Central) Rules 1950 made on 28-10-1950. Rule 6 provides that the notice should be given in Form 1 to the person claiming title to such property or interest and to any other person whom the Custodian considers to be interested in the property. The prescribed Form No. 1 is defective or inconsistent with the provisions of Section 7 (1) in three ways. Firstly it purports to be addressed only to the evacuee, whereas the notice is to be given to all the persons interested. "Evacuee property" was defined in the Act originally as property in which an evacuee has any right or interest but excluding property belonging to a joint-stock company. An evacuee who has any right or interest in a property is undoubtedly a person interested in it but other persons also may be interested in it, for instance persons who also have a right or interest in it, or who are in possession of it, or who claim adversely to the evacuee or dispute his right or interest in it. A notice to all of them is required to be given under section 7 (1); see the observations of Tendolkar J. in the case of

Allauddin (H) at page 215. Rule 6 itself requires a notice to be served upon the evacuee and "any other person or persons whom he considers to be interested in the property" We do not at all agree with Sri Dhawan that this rule goes beyond the scope of Section 7. The definition of "evacuee property" being so wide as to include any property in which an evacuee has any right or interest, there may be property in which an evacuee and non-evacuees have a right or interest and the non-evacuees are undoubtedly persons interested in it and therefore, entitled to a notice. Secondly the notice calls upon the evacuee to show cause why he should not be declared an evacuee; no such notice is required to be given under Section 7 (1). The only declaration contemplated is that a certain property is evacuee property and not that a certain person is an evacuee. The Act is concerned with administration of evacuee property and not with evacuees. The very declaration that a certain property is an evacuee property means that some evacuee has a right or interest in it; the identity of the evacuee is wholly immaterial for the purposes of the Act. Thirdly the form does not require the property to be described; it only requires the evacuee to show cause why "all your property" be not declared as evacuee property. As the Act is concerned with administration of evacuee property, it must deal with property and not with persons; any property that is required to be declared to be evacuee property must be specified in the notice. Calling upon a person to show cause why all his property be not declared evacuee property without its being specified or described is meaningless; once he is found to be an evacuee, by operation of the law contained in Section 2 (f) all property in which he has any right or interest becomes evacuee property and he cannot possibly show any cause against it. He may show cause against a particular property being declared as evacuee property, but no cause can be shown against all his property being declared to be evacuee property because nobody can urge anything against the operation of law that is valid. It is open to an evacuee to urge that a certain property shown in the notice as property in which he has any right or interest is not such property. Since the notice is to be given also to other persons, they must know what is the property sought to be declared as evacuee property. They cannot show any cause against the evacuee's property being declared as evacuee property; therefore, it would be futile to ask them to show cause why all property of a certain person, who is an evacuee should not be declared as evacuee property, and they must be informed of the specific property which is expected to be declared so that they can show cause if it is not liable to be declared as such on the ground that the evacuee has no right or interest in it. If the person is not an evacuee, his property cannot be declared to be evacuee property and if this is the ground on which the declaration of evacuee property is to be resisted, it is not necessary for the objector to know the description of the property. But the only person who would be interested in resisting the declaration on this ground is the evacuee himself or his relations; other persons would not be interested in urging before the Custodian that he is not an evacuee and, therefore, none of his property can be declared as evacuee property. The provision in Section 7 (3) that the Custodian must notify all properties declared to be evacuee property in the official gazette shows that specific property must be declared as evacuee property and not "all property belonging to the evacuee." The notification published in the gazette must contain full description of the properties so that they can be identified.

14. On 5-7-1950 the Deputy Custodian, Deoria, issued a notice on Form No. 1, under "rule 5 (1)" to Khatoon Bibi calling upon her to show cause why she should not be declared an evacuee and all her property, as evacuee property under the Ordinance No. XXVII. In the grounds for treating her as an evacuee are stated all the three grounds contained in Section 2 (d) of the Act. No description of the property said to belong to her and contemplated to be declared evacuee property has been given in the notice. The Ordinance No. XXVII was no longer in force and no notice could be issued under it or under the rules framed there under. The notice ought to have been issued under the Act. No manner of giving notice had been prescribed before 5-7-1950, but the notice had still to be given in compliance with Section 7. If the manner had been prescribed, it should have been given in the prescribed manner; otherwise it could be given in any manner deemed by the Custodian to be fit. In the case of Allauddin (H) it was pointed out by Tendolkar J., that the notice must be given even if no rules prescribing the manner had been framed. Though the Ordinance No. XXVII, had been repealed, the Rules made in exercise of the powers conferred by it upon the Central Government continued to be in force, by virtue of the provisions of Section 58 (3), till 28-10-1950 when they would be deemed to have been impliedly repealed by the Rules of 1950. Making the Rules was an action taken in the exercise of the powers conferred by the Ordinance; the Rules would, therefore, be deemed to have been made in exercise of the powers conferred upon the Central Government by Section 56 of the Act. The notice, therefore, could not be challenged on the ground that it was issued on a form prescribed by the Rules made under the repealed Ordinance. In the notice it was stated that Khatoon Bibi was an evacuee within the meaning of the Ordinance. It would have been better if she had been described as an evacuee within the meaning of the Act which was then in force. But we do not think that describing her as an evacuee within the meaning of the Ordinance was a fatal defect in the notice, inasmuch as if she became an evacuee within the meaning of the Ordinance, i.e., through its operation, she remained an evacuee even after it was repealed. Under Section 7 of the Act property of an evacuee became an evacuee property regardless of whether he became an evacuee under the Act or under the repealed Ordinance. Even though Khatoon Bibi became an evacuee under the repealed Ordinance, so long as her property had not been declared to be an evacuee property and had not vested in the Custodian, action could be taken under Section 7 and 8 of the Act. The defect of not mentioning the property sought to be declared as evacuee property was, however, a substantial defect. It might have been only a technical defect in the notice served upon Khatoon Bibi but was a substantial defect in the notice served upon other persons who were entitled to know which property was under the threat of being dealt with as evacuee property. Unless they knew which property was under this threat, they could not file a proper objection and if the notice did not give them an opportunity of filing a proper objection, it was no notice in the eye of law. In *Mohammad Balam Sheikh v. R. S. Trivedi*¹⁰, Tendolkar J. stated that the Custodian has to be satisfied that a particular property is evacuee property, that it is not open to him to show generally that the assets of a business are evacuee property without giving a description by which they can be identified and that the law requires that the notification should give sufficient particulars of the property so as to make it possible for any person to identify it. Sri Dhawan has

two replies to the contention that the notice was invalid, (1) that an evacuee himself cannot object to the want of particulars of the property in the notice and (2) that the property in dispute had already become evacuee property and no inquiry and declaration under Section 7 were required at all. The first reply is sufficient as far as it goes but does not answer the question about the notice to other persons interested. Khatoon Bibi herself was in Pakistan and no notice could be served upon her. Abul Barkat was the person interested in her property. Moreover if the whole Sugar Works together with the appurtenant land and buildings were taken to be evacuee property, there were so many other persons who had a right or interest in it and who ought to have been given a notice, but were not. The Custodian issued notice to Khatoon Bibi and to none else, not even to Abul Barkat who was looking after her interest in India.

15. Abul Barkat filed an objection on 21-7-1950 in response to the notice denying that Khatoon Bibi was an evacuee and stating that the only property owned by her was one anna and nine pies share in the sugar works. The objection was dismissed by the Deputy Custodian on 7-3-1951. He observed that Khatoon Bibi was admittedly an evacuee and that the property was sufficiently, although not thoroughly, described in the notice and declared it to be evacuee property. The order of the Deputy Custodian was illegal because of the defect in the notice. There is no force in the contention advanced on behalf of the opposite-parties that the defect in the notice did not affect the operation of the Act, the argument being that the property had already vested in the Custodian under the Ordinance and that the notice had been issued only by way of abundant caution. We have found that the property had not vested in the Custodian under the Ordinances and could vest only on its being declared to be evacuee property

¹⁰ AIR 1955 N.U.C. (Bom) 21
under section 7.

16. As regards Bashir Ahmad and Nasir Ahmad, the first action taken against them was a notice under Section 7 of the Act No. XXXI, on 8-1-1953. On 14-10-1953 a second notice was given, on Form No. 1, calling upon them to show cause why they should not be declared evacuees and all their property as evacuee property under the Act. In the list of property given in the notice were mentioned two annas and two pies share in the Noori Sugar Works, Bhatni, and landed property in village Sohnag, Lohra, Lakshimipur and Dumusa. No objection was filed and no orders were passed. On 19-1-1954 third notice was issued in Form No. 1 calling upon them to show cause why they should not be declared evacuees and "all your property as evacuee property". The notice was also to be served upon their brothers Abdul Razzak and Nasir Ahmad. No property was described in the notice issued to the two men, but it was described on the back of the office copy retained by the Assistant Custodian. The notice purported to have been given under Rule 5 (1) of the rules framed under an Ordinance and not under Rule 6 of the rules framed under the Act No. XXXI, which were then in force. Since no orders had been passed on the second notice dated 14-10-1953 and instead this notice was issued on 19-1-1954, the second notice must be treated as cancelled or waived by the Assistant Custodian and should be left out of consideration. The third notice must be held to be an invalid notice on account of its not

containing description of the property sought to be declared as evacuee property. The description of the property given in the second notice cannot be deemed to have been imported into the third notice in order to validate it. Objections were filed by Abdul Razzak and Bashir Ahmad on 14-12-1955. The Custodian declared both men to be evacuees. As regards the property mentioned in the second notice he held that the whole property of Shukrullah was composite property and that the shares of the two evacuees will be determined by the Competent Officer at the time of separating the shares of the non-evacuees. An appeal against that order is pending.

17. The Act No. LXIV was enacted with the avowed object of providing an expeditious method for the assessment and separation of evacuee and non-evacuee interests inter-mixed in any property. We have already mentioned the definition of "evacuee property" in the Ordinance No I. The definition was wide enough to convert the whole of a property in which an evacuee had any right or interest into evacuee property. The Act No. XXXI, enacted the same definition in Section 2 (f); this definition was considered by a Full Bench of this Court in *Asiatic Engineering Co. v. Achhru Ram*¹¹, The Asiatic Engineering Company was incorporated as a private company and had its registered office in Calcutta. A share-holder of the company became an evacuee and it was held by the Full Bench that the definition of "evacuee property" in the Act No. XXXI, was wide enough to cover the assets of an incorporated company, if any of its share-holders becomes an evacuee because he has interest in the assets. It was recognized that the assets of a company belong to it and not to the individual share-holders and that a company and its share-holders are in law separate entities, but it was held that it does not follow that a share-holder has no interest in any capacity in the assets. A share was treated as an interest in the company's assets or an aliquot share in the company's capital. Accordingly the Full Bench decided that a custodian had jurisdiction to treat the assets of a company as

¹¹ AIR 1951 All 746

evacuee property on the ground that one of its share-holders was an evacuee. The definition excluded from its scope any property belonging to a Joint-Stock Company, the registered office of which was situated before the 15th of August, 1947, in any place now forming part of Pakistan and continued to be so situated after that date. This exception confirms that property belonging to a joint-stock company could become evacuee property if any of its shareholders becomes an evacuee. However wide a meaning can be given to the word "interest" used in the definition, it is for consideration if it includes interest arising from title itself. Interest in a property may arise either from owning it, whether exclusively or jointly with others, or from owning another property connected with it. A person or two persons owning a property have a title or right in it and have also an interest in it, but the interest is derived from their title or right and does not exist independently of it. A person having a right of easement in a servient tenement does not own the servient tenement but has an interest in it and the interest is derived from his owning another property, namely, the dominant tenement; this is a case of interest in a property being independent of title or right in it. Similarly in the case of a joint-stock company a share-holder does not own the property belonging to the company but has an interest in it; what he owns is the share or shares held by him and his interest in the company's property is derived from that

ownership. The property is owned by the company which is a legal entity distinct from the shareholder; thus he has no title to the company's property though he has an interest in it. Now it seems to me from a consideration of various provisions of various Acts dealing with evacuees and evacuee property that the word "Interest" was used in the definition to mean interest not derived from a right or title in the property but existing independently of it. A property in which an evacuee had a right or title became evacuee property on account of his having a right in it and it would have been quite unnecessary for the Legislature to provide that it would become evacuee property on account of his having an interest derived from the right or title in it. There cannot be a right or title in a property without there being an interest. A right cannot exist without interest though interest can exist without a right. Since the word "right" in the definition must necessarily include interest, the word "interest" must refer to interest not derived from a right. The word "or" was used in the sense of an alternative; a property became evacuee property if an evacuee had a right in it or in the alternative, i.e., if he had no right, he had at least an interest in it. In other words, a property became an evacuee property on account of interest only if the evacuee had no right in it.

18. This distinction between interest arising out of a right existing in the property and interest arising independently of any such right is very material when one has to consider a property owned by two or more persons. The joint owners may be tenants-in-common or joint tenants (or coparceners). In the case of tenants-in-common they own the property in ascertained or defined shares, but the property has not been divided into the shares. In the case of joint tenancy the joint owners own the property in coparcenary and their shares have not been ascertained and cannot be ascertained except perhaps at the time of partition. In a tenancy-in-common a joint owner's share is inherited on his death by his personal heirs, whereas in a joint tenancy on the death of a joint owner the property belongs to the surviving joint owners. In a tenancy-in-common each joint owner owns or has a right in his share; in a joint tenancy all the joint owners together own the property, a joint owner having no ascertained share cannot be said to own a particular share in it. If a property is owned by two persons in equal shares, each is an owner of a moiety in it and each can have his moiety separated from the other. But if two persons have an interest in a property, their interests cannot be separated and must always remain joint. There can be extinction of the interest of one of them but not partition. Assets of a company became evacuee property on account of an evacuee share-holder's having an interest, but since the interest extended over the entire property the entire property must become evacuee property. In the case of tenancy every joint owner owns his share in the property and his share can always be separated from the others' share. The share owned by him could alone become evacuee property. He could be said to have an interest in the whole property, but since his interest was derived from his share in the property, which share could be partitioned off leaving him without any interest in the rest of the property, it would have been unnecessary and unreasonable to make the whole property evacuee property. So it could not have been intended by the Legislature that the whole should become evacuee property. This intention could be effectuated by interpreting the words "or interest" as suggested above.

19. What I have said is supported by authorities. In *Nisar Ali v. Nawazish Ali*¹² Ram Lall J., with whom Addison J., concurred, observed at page 571 :

"Where there is a jointness of title, each coparcener is in possession of every portion of the joint property while his share is not defined Such jointness of title can ordinarily exist in the case of a coparcenary property only, but where the shares of co-owners are known and ascertained, a suit for partition is virtually a suit to enforce a right to a share in joint family property."

*In re Schar Midland Bank Executor and Trustee Co., Ltd. v. Damer*¹³, Vaisey J. observed :

"with regard to joint tenants, that "the unity of the estate and of the interest in the estate enures for the benefit of each and all and each and all have one undivided and indivisible property in the subject-matter".

We may also refer to *Prem Lata v. Janka*¹⁴ where the questions of rights of a joint tenant and of a tenant-in-common were discussed by our late brother Kidwai and myself. We have said at page 364 :

"If A and B are tenants-in-common of property X, each is an owner of his share in X. If their shares are equal, each owns one moiety in it and neither has any connection or concern with the moiety of the other except that their possession is joint."

Observations of Tendolkar J. in the case of *Allaudin (H)* (Supra) at page 216 support what I have said.

20. Now we shall mention the circumstances which indicate that if an evacuee had a

¹² AIR 1939 Lah 568

¹⁴ ILR (1951) 2 All. 328

¹³ (1950) 2 All. E. R., 1069. at p. 1072

share in a property owned by him jointly with non-evacuees, it was never the intention of the Legislature to make anything more than his share evacuee property. The definition of "evacuee property" in the Act, No. XXXI, was first amended by the Amendment Act No. XXII of 1951 which came into effect on 28-4-1951. The only effect of the amendment was that property belonging to a joint-stock company (which had its registered office in India) became evacuee property only if not less than 50 per cent of its shares were held by evacuees. The amendment only confirmed that a property belonging to a joint-stock company was intended to become evacuee property on the ground of a share-holder of it having become an evacuee. The next amendment was brought about by the Amendment Act, No. XI of 1953, which came into effect on 9-4-1953. It recast the definition : "evacuee property" now means any property of an evacuee (whether held by him as an owner or as a trustee or as a beneficiary or as tenant or in

any other capacity) and includes any property obtained by transfer from an evacuee after 14-8-1947.' Now a property cannot become evacuee property if it does not belong to any evacuee; it is not enough that he has only an interest in it. The law now makes a distinction between a property in which an evacuee has a title and a property in which he has only an interest; the latter is excluded from the definition of evacuee property. What is material is the reason for the amendment. It is said in the statement of objects and reasons for the Act that certain difficulties which were being experienced by a section of the population in disposing of their property on account of the existing provisions of the Act, had to be removed and certain changes which were considered necessary in the light of the experience of the working of the Act had to be made. It appears that apparently the Legislature found that the interpretation placed by the courts on the language used by it in the definition, on account of its width, went beyond its intention. We have already stated the object behind the enactment of the Act, No. LXIV. It is said in paragraph 1 of the statement that owing to an evacuee's interest being intermixed with non-evacuee interest in a property owned jointly by the two it becomes difficult to determine the exact property which vests in the Custodian. This means that the whole of a property jointly owned by an evacuee and non-evacuee was not intended under the Act to vest in the Custodian; in other words only the share of the evacuee was to vest in him. Then it is stated that the Act was designed to provide for the separation of the evacuee and non-evacuee interests in the property. It would not have been necessary to separate the two interests if the whole property vested in the Custodian. Assessment of the evacuee interest, which would be necessary for other purposes, could be done without actually separating it. The separation would be necessary only in order to ascertain the exact property which would vest in the Custodian under the Act No. XXXI. Composite property is defined in the Act to mean "any property which or any property in which an interest, has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950), and in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not being an evacuee" or the evacuee interest is subject to a mortgage in favor of a non-evacuee or consists of a right under a mortgage executed by a non-evacuee. "Evacuee property" within the meaning of this definition is "the right, title or interest of an evacuee" in the composite property. We do not understand the necessity for this definition of evacuee property; the definition of composite property refers to a property that has been declared to be evacuee property under the Act, No. XXXI, and there arises no question of interpreting the words "evacuee property". Any property that has been declared under the Act No. XXXI, to be evacuee property becomes composite property if certain conditions are fulfilled; the Competent Officer has only to see the declaration and not the meaning of evacuee property in order to ascertain whether a property is composite property or not. The words "an undivided share" in the definition of a composite property cannot mean a share that has not been partitioned off, because otherwise the evacuee would not be a co-sharer in the property at all. A person can be a co-sharer in the property only so long as it remains joint; if his share has been partitioned off by metes and bounds, he becomes the exclusive owner of the part allotted in his share and has no right, title or interest left in the remaining part allotted in the shares of the remaining co-sharers. If any meaning is to be given to

the word "undivided," it must be "not divided and indivisible". If the share of a co-sharer cannot be ascertained and, therefore, has not been ascertained, as in the case of coparcenary property or in the case of interest not derived from title, it would be a case of undivided share. The share of a coparcener cannot be ascertained unless the coparcenary has come to an end. Similarly an interest of a share-holder in the assets of a company cannot be ascertained unless the company goes into liquidation and the assets are distributed among the share holders in proportion to their shares. In a continuing coparcenary or company or in the assets of a continuing company the share or interest of a coparcener or a share-holder cannot be ascertained and, therefore, can be said to be an undivided share or interest. In a tenancy-in-common the share of a co-sharer, though not separated by metes and bounds, is divided because it has been ascertained. According to this interpretation composite property does not include a property owned by tenants-in-common some of whom are evacuees though it would include property held by joint tenants some of whom are evacuees. Had it been the intention behind the Act, No. XXXI, that property owned by an evacuee along with non-evacuees as tenants-in-common would become evacuee property, the question of separating the interest of the evacuee would not arise and it would have been included in the definition of composite property. It exclusively means that it was not intended to be evacuee property. Whenever the right or interest of an evacuee was unascertainable, the whole property had become evacuee because the only alternative was that it did not become evacuee property. Though the Act provides for separation of evacuee interest from non-evacuee interest, it does not provide for the divesting of the non-evacuee interest. Section 11 certainly does not have the effect of divesting the non-evacuee interest if it had vested in the Custodian. It would have been useless for the Legislature to provide for separation of evacuee interest from non-evacuee interest if even after the separation the non-evacuee interest continued to vest in the Custodian. The Act would have served some purpose only if the non-evacuee interest did not remain vested in the Custodian after the separation. Since the Act does not contain any provision divesting the Custodian of authority over it, he would not have any authority over it after the separation only if he had no authority over it even prior to it, that is, it had not vested in him.

21. In practice also it seems that a property was not declared to be evacuee property merely because an evacuee owned a share in it. There were hundreds of mohals and pattis in this State which were owned by tenants-in-common some of whom were evacuees, but they have not been declared to be evacuee properties; only the shares of the evacuee co-sharers have been declared to be evacuee properties.

22. The order of the Custodian dated 14-12-1955 in respect of the property belonging to Nasir Ahmad and Bashir Ahmad is not clear. He held them to be evacuees but did not decide what exactly was the property which became evacuee property. In the absence of the deed of waqf he could not say what were their beneficiary interests. Instead he contented himself with saying that the property in dispute was composite property. Under Section 7 he was bound to pass a clear order declaring particular property to be evacuee property; since he did not declare any property

to be evacuee property, it could not be deemed to have vested in the Custodian. The Sugar Works therefore, did not become composite property on account of any order passed by the Custodian in re Bashir Ahmad and Nasir Ahmad. The property was not declared to be evacuee property and did not vest in the Custodian on account of any order passed in re Khatoon Bibi also. Therefore, it did not become composite property within the meaning of the Act No. LXIV.

23. Bashir Ahmad and Nasir Ahmad as beneficiaries were entitled to only half the income of five annas and four pies share, the ownership of which vested in God. The beneficiaries, therefore, had interest in the income but not in the corpus; merely on account of their being entitled to a share in the income they could not be said to have an interest in the corpus also, however wide a meaning may be given to the word "interest". Their share in the income or even the whole income might become evacuee property but not the corpus. The corpus, therefore, could not become composite property on account of the two men being evacuees. Even the income of the Sugar Works did not become evacuee property because their interest in it was derived from their title to five annas and four pies share in it and only their share in the income became evacuee property. Since they were the exclusive owners of their share in the income, it did not amount to composite property. Whatever may be the meaning of "an undivided share" there can be nothing like an undivided share in money belonging to two or more persons in ascertained or ascertainable shares. If an evacuee was entitled to a certain fraction of an income, only the amount pertaining to his share became evacuee property and not the whole of it.

24. Our finding, therefore, is that the Sugar Works did not amount to composite property within the meaning of the Act, No. LXIV, and that consequently the Competent Officer had no jurisdiction to take action under Section 10 of the Act No. LXIV in respect of it.

25. The provisions of Section 10 (a) (iii) were attacked as unconstitutional as infringing the freedom guaranteed by Article 19 (1) (f). Entry No. 41 of List III of the Constitution enables Parliament to enact a law with respect to evacuee property; it was argued that Parliament can make a law only in respect of evacuee property and not in respect of others.'" Through Section 10 (a) (iii) Parliament has made a law allowing non-evacuee property to be sold. Applying the pith and substance doctrine I find that the provision permitting sale of non-evacuee property is a part and parcel of the law dealing with evacuee property. Evacuee property cannot be dealt with without affecting non-evacuee property where the two are mixed together. Even for the purpose of separating the evacuee property one must touch the non-evacuee property and a law dealing with separation of non-evacuee property cannot be held to be ultra vires the Parliament, because it per force affects non-evacuee property. If non-evacuee property is affected, it is affected incidentally; the law does not in pith and substance deal with non-evacuee property.

26. If the composite property has vested and is deemed to have vested in the Custodian under the Act No. XXXI, the Act, No. LXIV, does not take away any rights of the non-evacuees. So long as the composite property vested in the Custodian they could not deal with it and could not

derive any profit out of it. The Act No. LXIV, has been enacted in order to mitigate the hardship suffered by them; far from their being prejudiced by it they are to be benefited by it. Whereas prior to the Act the whole property vested in the Custodian and would be dealt with by him in any manner he liked. Now under the Act non-evacuees are entitled to have their interest in the composite property separated from the evacuee interest so that they can deal with it as owner. The object behind the provisions of Section 10 is to separate the interest of evacuees from those of non-evacuees and the separation is to be done in the manner laid down in Section 10 subject to any rules that may be made by Government. Government have laid down the principles to guide the discretion of the Competent Officers. (Evacuee Interest (Separation) Rules 1951, Rule 11-B). If the partition can reasonably and conveniently be done, it must be done. If it cannot be done, the non-evacuees are given the option to buy the interest of the evacuees. It is only when they do not exercise the option that the whole property is to be put to auction. If the property cannot reasonably and conveniently be partitioned and if the non-evacuees are not prepared to buy the interest of the evacuee, there is no option but to sell the whole property and distribute the proceeds. This provision is just like the provision in Section 2 of the Partition Act and if the Partition Act is not unconstitutional, this Act also is not unconstitutional. The whole object behind the creation of evacuee property is to compensate displaced 'persons' for the property left by them in Pakistan with evacuee property. When an evacuee's interest is mixed with non-evacuee's interest, it must be separated before it can be given in compensation to a displaced person. Even if it could be said that the provisions of Section 10 (a) (iii) infringed Article 19 (1) (f), the restrictions imposed by them are in the interest of general public. It is in the interest of the general public that displaced persons be settled in India and be provided with property in compensation of the property left behind in Pakistan. The Act No. XXXI was held to be in general interest of public in *Namazi M. B. v. Dy. Custodian of Evacuee Property Madras*¹⁵, Sri S. S. Dhawan contended on the authority of *Golam Bari v. State of West Bengal*¹⁶ that a law is unconstitutional only if it directly infringes the guaranteed freedoms and not if it indirectly infringes them. The compulsory sale of non-evacuee's interest is said to be the indirect result of the separation of the evacuee's interest from the non-evacuee's interest. No law can infringe a freedom guaranteed under Article 19. We take this to mean that no law can infringe it directly or indirectly. Infringement of the freedom is excused on certain grounds mentioned in Article 19 (1) ((2) to (6)?) and if a law infringing any of the freedoms is to be sustained, we would sustain it on the ground of Article 91 (2) ((2) to (6) ?) and not on the ground that the infringement is

¹⁵ AIR 1951 Mad 930

¹⁶ AIR 1954 Cal 248

not the main object of the law but only an incidental effect of enforcement of its provisions. We hold that having regard to Article 19 (2) ((5)?) Section 10 (a) (iii) of the Act No. LXIV, is not unconstitutional.

27. This Court is not sitting in appeal over the order of the Competent Officer and has no power to set aside his findings of fact. We cannot interfere with his finding that the Sugar Works cannot reasonably and conveniently be partitioned. Even otherwise we agree with the finding. The Sugar

Works cannot be separated from their site and appurtenant land. The mills themselves cannot be partitioned. They cannot be worked without there being appurtenant land on which carts bringing sugarcane can be parked and quarters for officers and workers, godowns etc., can be constructed. All the appurtenant land must go with the mills. When the non-evacuees were not prepared to buy the shares of the evacuees, the whole property had to be sold. Azimun Nisa, Abdul Wahid, Abdul Majid, Khudaija Bibi and Shamshun Nisa in their claims estimated the price of the composite property at Rs. 20,00,000/- and said nothing about the order of preference in which they desired to have their interest separated from that of the evacuees under Section 10. As regards the price of the waqf share to be realised on sale, the Competent Officer directed that it should be deposited in the State Bank of India and that the mutwalli and the Custodian would be entitled to withdraw interest in equal shares so long as the mutawalli did not get a new scheme of waqf sanctioned by the District Judge. He proceeded properly in the matter of selling the Sugar Works. He got the property valued by two authorities. The Superintendent, Valuation Officer Khan Market, valued the Sugar Works including the land and the machinery at Rs. 14,50,000/-. A sale proclamation was then issued on 6-7-1956 and the opposite-party, No. 3, purchased the Sugar Works along with the land for Rs. 16,00,000/- and odd on 13-8-1956. An objection was filed on 6-9-1956 but was dismissed on 1-10-1956. In the meantime this petition was filed on 27-9-1956 and the confirmation of the sale has been stayed.

28. Bashir Ahmad, Nasir Ahmad and Khatoon Bibi all were evacuees within the meaning of the Act No. XXXI. They had admittedly left India after the first day of March, 1947, for Pakistan and it appears from the counter-affidavits that they had left on account of the setting up of the dominions of India and Pakistan. It was vehemently contended that Khatoon Bibi did not leave India on account of the setting up of the two dominions or of civil disturbances or of fear of such disturbances. It is very difficult to believe that she went to Pakistan to see her ailing sister-in-law in December, 1947. On account of the disturbances that had broken out and the difficulties of travelling one would not think of going from India to Pakistan merely to see an ailing relation. Further, that relation was not a close relation; she was only the husband's sister. It is strange that Abdul Barkat did not go to see her but instead sent his wife. There is nothing in the affidavits filed on behalf of the applicants to suggest that she went to Pakistan with the intention of returning in a short time. Then the fact is that she did not return for more than three years and that when she returned it was on a passport obtained by her as a Pakistan national. If she had not given up her Indian citizenship, she was an Indian national and she was to return to India as such. Having obtained a pass-port as a Pakistan national she is estopped from contending that she is still an Indian national. The order of the Deputy Custodian dated 7-3-1951 shows that the fact of Khatoon Bibi's being an evacuee was admitted before him. On 2-3-1956 Abdul Wahid petitioner stated in an affidavit sworn before the Competent Officer that Rahmat Bibi had in an oral will bequeathed to Azimun Nisa petitioner a share that would have gone to Khatoon Bibi saying that she had migrated to Pakistan. From the counter-affidavit filed on behalf of the Custodian on 5-12-1956 it appears that Abul Barkat himself admitted that Khatoon Bibi was an evacuee and entered into an agreement with the Custodian on that admission. An evacuee is not the same as a

person who has given up the Indian citizenship. A person might not have lost Indian citizenship but still might have become an evacuee within the meaning of the Act No. XXXI. The word "migrated" is used in the Constitution but not in the Act No. XXXI, which, instead, uses the word "left". No question of intention arises; the only thing to be seen is in what circumstances or why the person left India. The Custodian had to act only on what he knew; he could not be expected to know the exact intention in the mind of the person leaving India, though he could know the circumstances in which he did so. If he thought that the person left on account of the setting up of the dominions or disturbances or fear of disturbances, he had every power to declare him as evacuee and to take possession of his property.

29. The last contention of Sri S. S. Dhawan was that the petitioners should not be granted the relief because they have been guilty of laches and the petition is mala fide. The applicants have certainly been guilty of great laches; they have slept over their rights for five years. They took no steps to have the orders of the Custodian set aside on the ground of the illegality of the Ordinances and of the notices issued under the Act No. XXXI. The Act No. XXXI, was amended in the middle of 1954 by the Act No. XLII of 1954; there can no longer be any declaration of evacuee property. If there was any defect in the notice, it could be remedied before the enforcement of the Act No. XLII of 1954, by the issue of another notice which was free from the defect; it is now impossible to remedy the defect in the notice and it seems that the applicants have filed this petition under the assurance that now the property cannot be declared to be evacuee property. No objection was filed to the notice issued under Section 8 (4) and (9) of the Ordinance No. XXVII. No appeal was preferred under Section 14 of the Act No. LXIV nor any revision under Section 15. No explanation has been given for the enormous delay in spite of its being pointed out by opposite parties in their counter-affidavits; the applicants filed rejoinder affidavit but did not explain the delay. No steps were taken by any of the applicants to stop sale of the Sugar Works by the Competent Officer; they waited for six months even after the order of sale before filing the writ petition. They filed it after commitments had been made by the opposite parties in pursuance of the order of sale. The sale was widely advertised in fifteen newspapers at considerable expenditure. The Competent Officer had served notice upon them in 1954, but they did not question his jurisdiction or the validity of the Act No. LXIV; instead they appeared before him, submitted to his jurisdiction and participated in the proceedings held by him. No appeal was filed under Section 24 of the Act No. XXXI, against the Custodian's order of 7-3-1951. On account of this conduct of the applicants we consider that we should not interfere now. In the *R. v. Stafford Justices*¹⁷ Sir Wilfrid Greene held at page 47 that

¹⁷(1940) 2 K. B. 33

"the Court, having regard to all the circumstances of this case, and in particular the knowledge and conduct of the council and the time which has elapsed, ought not in its discretion to grant the relief asked for".

He pointed out at page 43 that an order for the issue of a writ of certiorari is in all cases a matter of discretion, that if no special circumstances exist and if all that appears is a clear excess of

jurisdiction, a person aggrieved by that is entitled ex debito justified to his order and in deciding whether or not a particular remedy shall be granted the court is entitled to enquire into the conduct of the applicant and the circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought.

30. In accordance with our findings we dismiss the writ petition. Since the applicants succeed to some extent, we make no order about costs.

Petition dismissed. .